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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

ROBERT L. LOJA and MARIA LOJA,

Plaintiffs,

-against-

Index No.
24682/2008

ROBERT W. LAVELLE, KATHERYN M. LAVELLE
and EILEEN P. LAVELLE,

Defendants.

-----X

ROBERT W. LAVELLE, KATHERYN M. LAVELLE
and EILEEN P. LAVELLE

Third-Party Plaintiffs,

-against-

SLEEPY HOLLOW LANDSCAPING LAW CARE INC.

Third Party Defendant,

-----X

Westchester County Supreme Court
111 Dr. Martin Luther King Jr., Blvd.
White Plains, New York 10601
January 17, 2012

B E F O R E:

HONORABLE WILLIAM GIACOMA, Judge.

A P P E A R A N C E S:

GRANT & LONGWORTH, LLP
Attorney for the Plaintiffs
BY: JONATHAN RICE, ESQ.
377 Ashford Avenue
Dobbs Ferry, New York 10522

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O'CONNOR, MCGUINNESS, CONTE,
DOYLE & OLESON, LLP
Attorney for the Defendants/Third
Party-Plaintiffs
BY: DENNIS L. O'CONNOR, ESQ.
One Barker Avenue
White Plains, New York 10601

BEE, READY, FISHBEIN, HATTER & DONOVAN, LLP
Attorney for the Third-Party Defendants,
Sleepy Hollow Landscaping Lawn Care, Inc.
BY: MICHAEL SIRAVO, ESQ.
PATRICK K. FOSTER, ESQ.
170 Old Country Road - Suite #200
Mineola, New York 11501

IVY V. STUCKEY
SENIOR COURT REPORTER

Proceedings

1 (At this time, the attorneys enter the
2 courtroom and take their positions.)

3 COURT OFFICER: Come to order.

4 THE COURT: We have the Court
5 Interpreter, now so we can move on the record.

6 THE CLERK: This is the matter of Loja
7 versus Lavelle, Index Number 24682 of 2008 on
8 for the jury trial.

9 Counsel, please note your appearance for
10 the record.

11 MR RICE: Jonathan Rice, Grant and
12 Longworth with the firm of Grant and
13 Longworth, 377 Ashford Avenue, Dobbs Ferry,
14 New York 10522.

15 MR. O'CONNOR: Dennis O'Connor for the
16 Defendants, Katherine Lavelle and Eileen
17 Lavelle, 1 Barker Avenue, White Plains, New
18 York, O'Connor, McGennis law firm.

19 MR. SIRAVO: Michael Siravo, law firm of
20 Bee, Ready Fishbein, Hatter and Donovan for
21 Third-Party Defendants, Sleepy Hollow
22 Landscaping.

23 MR. FOSTER: Patrick Foster, law firm of
24 Bee Ready Fishbein, Hatter and Donovan, 170
25 Old Country Road, Mineola for Third-Party

Proceedings

1 Defendants, Sleepy Hollow Landscaping.

2 THE COURT: Okay.

3 MR. O'CONNOR: The parties are outside,
4 Judge.

5 THE COURT: Yeah. Let's get them in
6 because we're running a little late.

7 MR. O'CONNOR: The Court Officer wanted
8 them out.

9 THE REPORTER: The Court Officer went
10 down to get the jury, so that's why he had
11 them step out, Judge.

12 (At this time, Mr. Todd Burrell, the
13 Official Spanish Interpreter is present.)

14 (At this time, the parties on the matter
15 enter the courtroom and take a seat.)

16 THE COURT: Have them come up.

17 MR. RICE: Do you want the wife, too?

18 THE COURT: Yes. The wife can stay over
19 here. They can sit right over here with the
20 Interpreter right next to them.

21 THE CLERK: In the jury box.

22 THE COURT: Okay. He can sit right
23 there. Sit right there, sir.

24 (At this time, the Plaintiffs so comply
25 and take seats with the aide of the Official

Proceedings

1 Spanish Interpreter, Todd Burrell.)

2 THE COURT: All right. Now, I wanted to
3 speak directly to the two of you about what we
4 have been discussing in the back behind the
5 courtroom. This is a very difficult case.
6 Because of the inclusion of the Worker's
7 Compensation Board, there are barriers that
8 would have to be overcome in order to get you
9 an appropriate Judgment, okay? And I have
10 suggested and I have urged the attorneys to
11 try to settle the case and I have suggested a
12 range of numbers for settlement purposes that
13 I hope can be a framework for a settlement.

14 However, it is difficult actually
15 fashioning the appropriate settlement because
16 of the legal impediments that have to be
17 overcome, so I wanted you to know that because
18 I really believe that the best thing for
19 everybody and certainly the best thing for you
20 is to settle the case, because I believe it
21 may be the best way for the compensation that
22 you deserve to actually be received by you
23 sooner than later; okay?

24 I wanted you to know that. So now
25 counsel did you want to --

Proceedings

1 MR. RICE: Yes. I just wanted to confirm
2 for the record that last week there were some
3 discussions by the Court that were
4 communicated to my client about attempting to
5 settle the case in the range of 2.5 million as
6 a judgment amount. At the present time, we do
7 not even have the requisite offers from the
8 Defendants and the Third-Party Defendant to
9 reach that Judgment number.

10 The reason why we have been using a
11 Judgment number for accepting a gross
12 settlement number is because of the
13 apportionment issues in this case with the
14 Defendant being found ten percent responsible,
15 the Third-Party Defendant employer being found
16 60 percent responsible, and you being found
17 30 percent responsible.

18 There are some complex analyses that must
19 take place with regard to the benefits that
20 you may be entitled to in the future under an
21 analysis required to be performed and
22 calculated by the Court under a case known as
23 Burns versus Varraille and that involves an
24 individual like yourself with what maybe
25 classified as a partial disability and what

Proceedings

1 benefits you are entitled to under Worker's
2 Compensation for the rest of your life.

3 At the present time, since you have not
4 been classified as the Worker's Compensation
5 Board, there is no determination that you are
6 entitled to a Kelly adjustment under the case
7 of Kelly versus State Insurance Fund because
8 you haven't had a classification of a total
9 permanent disability.

10 That being said, the Defendants currently
11 have only offered \$200,000 but have indicated
12 that they could and would attempt to secure
13 another \$50,000.

14 MR. O'CONNOR: Reverse. You said that
15 backwards.

16 MR. RICE: Pardon me. The Defendants
17 have only offered \$200. The defense counsel
18 is indicating that to his knowledge the offer
19 is even lower, that they're only offering
20 \$50,000 but they would try to get another
21 \$150,000 of private money to make payment.

22 There was some indication that they would
23 attempt to, however, attain an additional
24 \$50,000 that would bring the total payment of
25 the Defendants to \$250,000 based upon the

Proceedings

1 appportionment required by the jury verdict on
2 liability, that would result in a \$1.5 million
3 payment from the State Insurance Fund on
4 behalf of the Third-Party Defendant.

5 Currently the State Insurance Fund is not
6 offering that amount. The State Insurance
7 Fund, as I understand it, is only offering the
8 sum of \$750,000 plus waiver of a lien of
9 approximately \$250,000.

10 It is my understanding that you have
11 refused that offer or those offers of
12 settlement, at the present time, because you
13 have deficient information from the Defendants
14 and because of that I have asked the Court to
15 Order the Defendants under CPLR 52.29 to
16 produce tax returns from 2006 to date, plus
17 financial records of any bank accounts, or
18 stock account that would be in excess of say
19 \$5,000 up to the present time so we can
20 understand whether or not they do have assets
21 that could satisfy any Judgment.

22 In addition, it is my understanding that
23 you have also received the advice and
24 communication from an attorney Ben Rabinowitz
25 at the firm of Gair, Gair and Canason,

Proceedings

1 regarding the intricacies of this case and the
2 difficulties presented in terms of collecting
3 a Judgment.

4 I wish you just confirm that this
5 information have been communicated to you and
6 at the present time you have rejected any
7 offer that has been made or hypothetical offer
8 because of its deficiency amount and the lack
9 of Financial Disclosure. Is my understanding
10 correct?

11 MS. LOJA: Yes.

12 MR. LOJA: Yes.

13 MR. RICE: I think that covers that,
14 Judge.

15 MR. O'CONNOR: Your Honor, just so I make
16 the record clear.

17 THE COURT: Yes.

18 MR. O'CONNOR: Mr. Keough is not here.
19 Anthony Keough, personal counsel for my
20 clients, Mrs. Lavelle and her daughter.
21 \$50,000 has been offered which is the total
22 available amount of insurance coverage. My
23 clients through their personal counsel have
24 made it clear that they will pay personal
25 money, make a personal contribution to a

Proceedings

1 settlement in this case, that all parties
2 under the totality of the circumstances
3 believe should be made in all possible efforts
4 to avoid a further jury trial.

5 Depending upon the total settlement
6 package that can be put together, and this
7 include flexibility and cooperation between
8 both the Plaintiffs, Mr. and Mrs. Loja and the
9 Third-Party Defendant and his carrier, then I
10 can assure the Court and the parties that
11 personal money, personnel assets from
12 Mrs. Lavelle and her daughter will be brought
13 forward in an effort to bring a settlement to
14 this case.

15 Thank you, Judge.

16 THE COURT: All right. And as all
17 parties know, the Plaintiffs have sued the
18 Defendant. They do not have the right to sue
19 the Third-Party Defendant and therein is the
20 difficulty in resolving this case at the
21 present time; okay?

22 MR. RICE: Your Honor, one other thing.
23 I just wanted to make sure that my clients
24 understood, as I have explained to them, that
25 hypothetically, if we obtain a verdict in

Proceedings

1 favor of my clients, say for \$7 or \$8 million
2 dollars, that would translate to a financial
3 obligation of the Defendants to pay \$700,000,
4 before any money would come from the State
5 Insurance Fund.

6 If the number was \$5 million dollars in
7 terms of a verdict, that would translate to
8 \$500,000 that the Defendants would have to
9 pay. On top of that, there would be interest
10 running on the Judgment and this then presents
11 a problem for any final payment from the
12 Defendants, in the event that they do not have
13 assets sufficient to satisfy a Judgment.

14 And I wish you to understand and to
15 confirm your understanding, that in the event
16 you get a verdict that is beyond the ability
17 of the Defendants to pay a ten percent amount,
18 plus additional money to trigger the
19 obligation of the State Insurance Fund to make
20 payment, then you run the risk potentially not
21 being able to collect the 60 percent amount of
22 any Judgment for damages that you would be
23 entitled to. Do you understand this?

24 MR. LOJA: Yes.

25 MR. RICE: Okay, does the wife

Proceedings

1 understands this?

2 MS. LOJA: Yes.

3 MR. RICE: Okay. Thank you.

4 THE COURT: All right. And, of course,
5 all parties understand that what we are trying
6 to do, by way of settlement, is have the State
7 Insurance Fund pay in one lump sum any
8 possible money that they might owe only after
9 it was paid by the Defendants.

10 MR. RICE: One other thing. Toward that
11 end, it's our understanding that we will be
12 able to receive the Financial Disclosure from
13 the Defendants tomorrow, sometime tomorrow.
14 And we should then review those documents and
15 based upon review of those documents, I would
16 request and the Court has requested that we
17 communicate to the Court and to the Defendants
18 and Third-Party-Defendants what your
19 settlement demand is.

20 I know we have discussed numbers
21 previously in a hypothetical fashion but we
22 have not been able to, as of yet, offer affirm
23 number under these circumstances because any
24 number we have contemplated is really a
25 reduced number from what you're entitled to,

Proceedings

1 and you justifiably have concerns about
2 reducing what you are willing to accept
3 because this is the money that you will need
4 to survive on for the rest of your life; okay?

5 Thank you.

6 THE COURT: Okay. I'm going to Order
7 that the Defendants turn over the tax return
8 as requested and bank account statements as
9 soon as possible.

10 MR. RICE: Your Honor, that also included
11 financial records. I don't know if there's
12 money market accounts, if there's stock
13 accounts, whatever it maybe, if it's anything
14 over a nominal sum, it should be produced so
15 that we have some understanding.

16 THE COURT: Right. That's going to be
17 Ordered. So Ordered. The Defendant is she
18 heard the Court order it; okay?

19 MR. SIRAVO: Judge, before we bring in
20 the jury, I just have a couple of housekeeping
21 issues I like to address with the Court's
22 permission.

23 THE COURT: All right. Go ahead.

24 MR. SIRAVO: First of all, I -- and I
25 believe Defendant have yet to receive

Proceedings

1 Plaintiff's Economist Report. It was our
2 understanding that the Economist Report was to
3 be exchanged last week. We have done so, we
4 have not yet received the Plaintiff's. I just
5 want to object to the introduction of any
6 expert testimony from the Economist.

7 And in that same vein, it's my
8 understanding that Plaintiff intends to call
9 Kevin Barbalet, B-A-R-B-A-L-E-T, to testify
10 with respect to the nature of Plaintiff's
11 work, when he was working in Sleepy Hollow
12 which I don't object to, testify to wages
13 which I do not object to, as long as the
14 testimony is seeking to elicit and comports
15 with the information contained in his Bill of
16 Particulars, specifically that the Plaintiff
17 was earning \$640 per week; the end.

18 There was no testimony as to any --
19 nothing indicated in the BP about overtime of
20 any benefits which is health insurance or
21 anything of the like and I want to have an
22 offer of proof from Plaintiff's counsel that
23 that is the information he seeks to introduce.

24 And if at some point down the road the
25 Economist testimony is allowed to be admitted,

Proceedings

1 that it also be based upon that evidence, that
2 being \$640 per week while he worked at Sleepy
3 Hollow.

4 That's it. Thank you, Judge.

5 THE COURT: All right.

6 MR. RICE: Your Honor, as we discussed on
7 Friday, I have copies of the economic
8 analysis, however, this is the old one, it's
9 the draft one. The updated one has not been
10 finalized and I expect those later. If you
11 want me to turn over these, I can turn them
12 over to them now.

13 THE COURT: Turn over the draft soon as
14 you finalize it and make sure counsel have it.

15 MR. RICE: Okay. With regard to the
16 Financial Disclosure, it's my understanding
17 that our Bill of Particulars asserts various
18 amounts for loss earnings but also for future
19 loss earnings in a global amount and obviously
20 past loss earnings are past loss earnings.
21 And the amounts, however, of any pay increases
22 are factored into inflationary issues --
23 inflationary factors and those were contained
24 in the general Financial Disclosure for the
25 Economist and I believe it's well within the

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1 power of the Court to disclose that the
2 Defendants actually have knowledge of that,
3 Third-Party Defendant have knowledge of it, so
4 it's nothing that is a surprise to anybody.

5 THE COURT: Okay. Good. All right.
6 Very good.

7 I'll bring the jury out, I have a brief
8 opening to them, very very brief. And then,
9 do you want to spend a couple of minutes just
10 summarizing your damages or do you want to go
11 right to the testimony?

12 MR. RICE: I'm not sure. Do counsel want
13 to do openings?

14 MR. O'CONNOR: I like to open, Judge.
15 And I like to ask if we're going to use this,
16 the T.V. to set up in here today?

17 MR. RICE: Yes. It's my understanding
18 we're going to use the T.V.

19 MR. O'CONNOR: Then I have an application
20 in that regard.

21 MR. RICE: And what I would request with
22 regard to the T.V. is, that at the point when
23 we are going to show it, we can move it
24 forward to here, because I think it would be
25 too hard for the jury to see from there. But

Proceedings

1 we can pull the tables back and it can be
2 rolled over.

3 THE COURT: Right. And we're not going
4 to use it before two o'clock this afternoon;
5 right? We're not going to use the T.V.?

6 MR. RICE: I don't think so.

7 THE COURT: Well, because I have the
8 Interpreter here, so to the extent we need to
9 have testimony, I like to have that first
10 thing.

11 MR. RICE: Okay.

12 MR. O'CONNOR: And, Judge, if Mr. Loja is
13 going to testify, then I have a motion in
14 limine. I'm not certain that this would come
15 out during his testimony, but there is a claim
16 for treatment by a Psychiatrist, suffering
17 from depression, Post Traumatic Stress
18 Disorder. And there is an issue as to his
19 young daughter that was killed most
20 unfortunately in a motor vehicle accident
21 involving his mother-in-law a number of years
22 ago and he received treatment by a
23 Psychiatrist before this lawsuit ever began.
24 And so I don't know what relevance, if any,
25 the death of his young daughter has to do with

Proceedings

1 it, but I want to make sure that's not brought
2 out inadvertently.

3 Secondly, I understand Mr. Loja's house
4 may be in foreclosure right now and I don't
5 think that that is a relevant issue to be
6 brought out in front of the jury either.

7 I'm not suggesting that there was going
8 to be an effort to do that but those are two
9 issues that are highly prejudicial and bear no
10 probative value on the issue of damages in the
11 case, Judge.

12 MR. RICE: Actually, both of those issues
13 do. It relates to who the Plaintiff was at
14 the time of the event. He has and will
15 testify about his depression since the event.

16 THE COURT: Since the accident?

17 MR. RICE: Since the accident. To the
18 extent that the issues with his daughter have
19 any relevance; he'll comment about it. I
20 mean, you take your Plaintiff as you find
21 them.

22 THE COURT: I tend to agree with
23 Mr. O'Connor. I don't see how the unfortunate
24 death of his daughter has any relevance to his
25 state of mind, subsequent to the accident,

Proceedings

1 unless you can enlighten me further.

2 MR. RICE: The only issue would be, Your
3 Honor, is that, as I understand it, involving
4 the dynamics of my clients. During that
5 unfortunate occurrence, when his daughter
6 died, he was the strong person in the family
7 and his wife had extreme difficulty and he was
8 the rock and subsequently now at this point,
9 he felt incapable of doing things and being,
10 you know, a man like he had been before, and
11 it's required his wife to make a new roll in
12 the family.

13 The dynamics of that, they would testify
14 to, it wouldn't be much to the extent that he
15 continues seeing a Psychiatrist. Currently he
16 saw somebody in the hospital. He wanted to
17 end his life in the hospital. And he got
18 immediate psychiatric help at the hospital and
19 he was able to come back to a rational center
20 where he understood that there was meaning in
21 life. It just has to do with the dynamics.

22 THE COURT: I'm going to grant the
23 application. I don't see where the relevance
24 or his unfortunate daughter's passing, prior
25 to this unfortunate accident is relevant. I

Proceedings

1 think it's more prejudicial and probative with
2 regard to his life subsequent to the accident
3 and the role that his wife now has to take.

4 MR. RICE: Understood.

5 THE COURT: I think that speaks for
6 itself.

7 MR. RICE: So my clients understand that.

8 THE COURT: It's not be brought up. How
9 about the foreclosure?

10 MR. RICE: It's an aspect of, they
11 brought a home and now they're not able to pay
12 their expenses for the home and they worked
13 out a surrender agreement with the bank where
14 it's my understanding that they won't have a
15 Judgment against them by the bank but they're
16 losing their home and they're looking for
17 another place to live.

18 MR. O'CONNOR: It's collateral, Judge. I
19 don't know the circumstances surrounding the
20 application for the mortgage. I do know that
21 Mr. Loja did receive monies from Worker's
22 Compensation. He received a partial payment;
23 there is some income. Judge, that's not
24 relevant, that's just adding more sympathy
25 onto an already sympathetic case.

Proceedings

1 It's sympathetic on its own merits, we
2 don't need to bring in before the jury the
3 fact that the family may have to move out of
4 the home we're going to see on a video.

5 Your Honor, I think it's unfair, it's
6 unnecessary and unduly prejudicial. I can't
7 contest why he's in foreclosure either, Judge.
8 I know that he's not earning \$670 a week, but
9 I don't even know what the mortgage payment is
10 and there's no claim in the Bill of
11 Particulars that this is related to our
12 accident, Judge.

13 THE COURT: All right. I'm going go
14 grant that application also, the discussion as
15 to the house being in foreclosure, but
16 certainly any other issue with regard to
17 finances is going to be elucidated.

18 Okay, anything else?

19 MR. SIRAVO: Nothing further.

20 THE COURT: Anything further from Third
21 Party?

22 MR. SIRAVO: No. And just for the
23 record, I join in the objection.

24 THE COURT: All right. So after your
25 brief openings, then we'll go to --

Proceedings

1 MR. RICE: Plaintiff.

2 THE COURT: You're going to call the
3 Plaintiff?

4 MR. RICE: Yes.

5 THE COURT: Okay. Brief. Five minutes.

6 MR. SIRAVO: I'm going to actually waive
7 any comments, other than, as long as Your
8 Honor is going to introduce me to the jurors,
9 since they never seen me before or I can do it
10 myself and then just say I'm going to waive
11 any comments towards damages.

12 THE COURT: Right. I think what we'll do
13 is, we'll call the case while they're here and
14 everybody can introduce themselves again so
15 that they're familiar with all the attorneys;
16 okay?

17 Okay. Thank you.

18 (At this time, a short recess was held.)

19 (At this time, the recess is over and
20 everyone takes their positions in the
21 courtroom.)

22 COURT OFFICER: Jurors entering.

23 (At this time, the members of the jury
24 enter the courtroom.)

25 THE COURT: All right, good morning